Petition

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No. 81-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALYESKA PIPELINE SERVICE COMPANY,
AMERADA HESS PIPELINE CORPORATION,
ARCO PIPE LINE COMPANY,
BP PIPELINES INC.,
EXXON PIPELINE COMPANY,
MOBIL ALASKA PIPELINE COMPANY,
PHILLIPS ALASKA PIPELINE CORPORATION,
SOHIO PIPE LINE COMPANY and
UNION ALASKA PIPELINE COMPANY, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Whether section 204(b) of the Trans-Alaska Pipeline Authorization Act impliedly repeals section 311(i) of the Federal Water Pollution Control Act with respect to the Trans-Alaska Pipeline System.

PARTIES

The parties to the proceeding in the United States Court of Claims, whose judgment is sought to be reviewed, are all listed in the caption of this case in this Court. Pursuant to Rule 21.1(b) and Rule 28.1 of the Supreme Court of the United States, the parents, subsidiaries (except wholly owned subsidiaries) and affiliates of each Petitioner are as follows:

Alyeska Pipeline Service Company is owned by Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, Sohio Pipeline Company, and Union Alaska Pipeline Company; Amerada Hess Pipeline Corporation is wholly owned by Amerada Hess Corporation; Arco Pipe Line Company is wholly owned by Atlantic Richfield Company; BP Pipelines Inc. is wholly owned by BP North America Inc., which is wholly owned by British Petroleum (Overzee) B.V., which is wholly owned by British Petroleum N.V., which is wholly owned by BP International Ltd, which is wholly owned by The British Petroleum Company Limited; Exxon Pipeline Company owns an interest in Dixie Pipeline Company, Plantation Pipeline, Qualbank, Inc., West Shore Pipe Line Company, and Yellowstone Pipe Line Company and is wholly owned by Exxon Corporation; Mobil Alaska Pipeline Company is

wholly owned by Mobil Oil Corporation, which is wholly owned by Mobil Corporation; Phillips Alaska Pipeline Corporation is wholly owned by Phillips Investment Company; Sohio Pipe Line Company is wholly owned by The Standard Oil Company (an Ohio Corporation) in which a controlling interest is held by British Petroleum (Overzee) B.V., which is wholly owned by British Petroleum N.V., which is wholly owned by BP International Ltd, which is wholly owned by The British Petroleum Company Limited; and Union Alaska Pipeline Company is wholly owned by Union Oil Company of California.

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THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

The opinion and judgment of the Court of Claims, *Alyeska Pipeline Service Company, et al.* v. *United States*, 227 Ct. Cl. _____, 649 F.2d 831 (1981), appears in the Appendix to this petition.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Claims in this case was rendered and entered on May 6, 1981. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

STATUTORY PROVISIONS INVOLVED

Section 311(g), Federal Water Pollution Control Act, 33 U.S.C. §1321(g):

Third party liability

> Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was

or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring in action against the third party in any court of competent jurisdiction to recover such removal costs.

Section 311(i), Federal Water Pollution Control Act, 33 U.S.C. §1321(i):

Recovery of removal costs

(1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to

recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act, or the Deepwater Port Act of 1974.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k) of this section.

Section 204(b), Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §1653(b):

If any area within or without the right-of-way or permit area granted under this chapter is polluted by any activities conducted by or on behalf of the holder to whom such right-of-way or permit was granted, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be at the expense of such holder, including any administrative and other costs incurred by the Secretary or any other Federal officer or agency. Upon failure of such holder to adequately control and remove such pollutant, the Secretary, in cooperation with other Federal, State, or local agencies, or in cooperation with such holder, or both, shall have the right to accomplish the control and removal at the expense of such holder.

Section 28(x), Mineral Leasing Act of 1920, as amended, 30 U.S.C. §185(x):

Liability

(1) The Secretary or agency head shall promulgate regulations and may impose stipulations specifying the extent to which holders of rights-of-way and permits under this chapter shall be liable to the United States for damage or injury incurred by the United States in connection with the right-of-way or permit. Where the right-of-way or permit involves lands which are under the exclusive jurisdiction of the Federal Government, the Secretary or agency head shall promulgate regulations specifying the extent to which holders shall be liable to third parties for injuries incurred in connection with the right-of-way or permit.

(2) The Secretary or agency head may, by regulation or stipulation, impose a standard of strict liability to govern activities taking place on a right-of-way or permit area which the Secretary or agency head determines, in his discretion, to present a foreseeable hazard or risk of danger to the United States.

(3) Regulations and stipulations pursuant to this subsection shall not impose strict liability for damage or injury resulting from (A) an act of war, or (B) negligence of the United States.

(4) Any regulation or stipulation imposing liability without fault shall include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented. Any liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence.

(5) The regulations and stipulations shall also specify the extent to which such holders shall indemnify or hold harmless the United States for liability, damage, or claims arising in connection with the right-of-way or permit.

(6) Any regulation or stipulation promulgated or imposed pursuant to this section shall provide that all owners of any interest in, and all affiliates or subsidiaries of any holder of, a right-of-way or permit shall be liable to the United States in the event that a claim for damage or injury cannot be collected from the holder.

(7) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

STATEMENT OF THE CASE

An unknown saboteur blew a hole in the Trans-Alaska Pipeline System ("TAPS") near Fairbanks, Alaska on February 15, 1978, releasing approximately 14,000 barrels of oil into Steele Creek and onto its adjacent shorelines. Petitioner Alyeska Pipeline Service Company, the operator of TAPS, responded to the sabotage by closing the pipeline and immediately commencing cleanup operations. The removal of oil was accomplished pursuant to all applicable federal regulations at a cost of $1,169,035.51.

As Steele Creek is a navigable water of the United States, Petitioner Alyeska Pipeline Service Company and Petitioners Amerada Hess Pipeline Corporation, Arco Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, Sohio Pipe Line Company and Union Alaska Pipeline Company, the owners of TAPS, invoked the jurisdiction of the United States Court of Claims under 28 U.S.C. §1491 and filed suit to

recover their cleanup costs pursuant to section 311(i) of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1321(i).

The Respondent moved the Court of Claims to dismiss Petitioners' suit on the grounds (1) that section 311(i) of the Federal Water Pollution Control Act was not applicable; and, (2) that section 204(b) of the Trans-Alaska Pipeline Authorization Act ("Pipeline Act"), 43 U.S.C. §1653(b), required Petitioners to bear the cost of removing any oil spilled from the pipeline, irrespective of the cause of the spill or the fault of the TAPS owners. The Court of Claims granted Respondent's motion, holding that Petitioners were strictly liable for the cost of cleanup of all oil spills from the pipeline and that, regardless of any intervening independent causes, the Petitioners were barred from recovery under section 311(i) of the Federal Water Pollution Control Act.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Significant And Recurring Problems Concerning The Application Of Section 311(i) Of The Federal Water Pollution Control Act And Section 204(b) Of The Trans-Alaska Pipeline Authorization Act To The Trans-Alaska Pipeline System.

This is a case of first impression involving the effect of two important statutes on the largest crude oil transportation system in the United States, which transports over 1.5 million barrels of crude oil per day from the nation's largest domestic source of oil.

Section 311(i) of the FWPCA is part of a comprehensive legislative scheme enacted, reconsidered and

re-enacted by Congress in 1970, 1972 and 1977. That section allows the owner or operator of a facility to recover his reasonable oil spill cleanup costs if he establishes that the discharge

> was caused solely by . . . (D) an act or omission of a third party, without regard to whether such act or omission was or was not negligent. . . .

33 U.S.C. §1321(i).

It is not disputed that the discharge in this case was caused soley by the act of an unknown third party saboteur. Yet, the Court of Claims has decided that Section 311(i) is inapplicable generally to the Trans-Alaska Pipeline System.

The Trans-Alaska Pipeline Authorization Act was enacted in 1973 so that the Trans-Alaska Pipeline could be constructed and placed in operation. Section 204(b) of that Act provides for cleanup by the right-of-way holders when "any area . . . is polluted by activities conducted by or on behalf of the [right-of-way holders]." 43 U.S.C. §1653(b).

The Court of Claims concluded that section 204(b) of the Pipeline Act and section 311(i) of FWPCA are "on their faces" "inconsistent." Appendix at 3a, 649 F.2d at 833. Accordingly, because the court found Section 204(b) to be a later enacted, special statute, Section 311(i) was determined to be inapplicable to TAPS. Appendix at 4a, 649 F.2d at 833.[1] In order to find a facial

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[1] It is not even clear that section 204(b) of the Pipeline Act is the latter enacted statute as the Clean Water Act, which amended section 311 of the FWPCA, became law after passage of the Pipeline Act. The Pipeline Act was enacted in 1973; the Clean Water Act was enacted in 1977.

"inconsistency" between the two sections, the Court of Claims had to excise judicially from Section 204(b) the requirement that an area be "polluted by any activities conducted by or on behalf of the [right-of-way holders]."[2] Only by so doing could the court hold that, "[t]he cause of the breach is immaterial in determining whether the discharge was attributable to the plaintiffs' 'activities'." Appendix at 4a, 649 F.2d at 833.

The court was not hindered by either the plain language of Section 204(b) or the "narrow purpose" shown by its legislative history. In the court's words, "[t]he absence of specific language in that section [204(b)] explicitly so stating [that the TAPS owners are liable for cleanup costs regardless of either the cause of the oil spill or the fault of the owners] does not negate [our] conclusion." Appendix at 7a, 649 F.2d at 835. Instead, the court determined that, "although the narrow purpose of the amendment [Section 204(b)] was to remove the $8 million limit upon the cleanup costs the United States could recover from a polluter under the Water Pollution Control Act, the language, intent, and

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[2] The court below blurred its excision with the following two inconsistent sentences:

> The pipeline area in this case was 'polluted by' the 'activities' of the plaintiffs *in operating the pipeline. The pollution resulted from the breach of the pipeline* through which oil was being transported.

Appendix at 4a, 649 F.2d at 833 (emphasis added).

The court cannot have it both ways: either the area was polluted by the activities of the pipeline owners or by the activity of the third party saboteur. The two are not the same. If Congress intended the TAPS owners to be liable for all oil spills regardless of cause, it would not have included the limiting language "polluted by activities conducted by or on behalf of the [holders]" in Section 204(b).

effect of the provision were not so limited." Appendix at 7a, 649 F.2d at 835.

Section 204(b) and Section 311(i) are not inconsistent. The two statutes can and should be construed harmoniously. Section 204(b) applies when an area is "polluted by activities conducted by or on behalf" of the holders of the right-of-way. When an area is polluted by activity conducted solely by a saboteur with no agency or other connection with the holders of the right-of-way, it is not polluted by activities conducted by or on behalf of the holders and Section 204(b), by its terms, does not apply. In such a circumstance, however, because the spill was caused solely by the act of the third party saboteur, section 311(i) of the FWPCA permits reasonable cleanup costs to be recovered if the other requirements of that section are satisfied.

Section 311(i), as enacted and re-enacted by Congress, encourages the prompt cleanup of oil spills by facility owners and operators themselves. The holding of the court below frustrates that congressional policy.

The case below involves two important federal statutes and the application of those statutes to the Trans-Alaska Pipeline System.[3] Because of the Court of Claims' exclusive jurisdiction under 311(i) of the FWPCA, the important issues raised in this case will only be decided in the Court of Claims, regardless of how many times they arise during the operation of the Trans-

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[3] The opinion below suggests in *dicta* that section 311(i) of the FWPCA may be generally inapplicable to any petroleum pipeline on federal lands authorized under the 1973 amendments to the Mineral Leasing Act of 1920. Section 28(x) of the Mineral Leasing Act, 30 U.S.C. §185(x), which the court discusses in its opinion at Appendix at 5a, 649 F.2d at 834, applies to all such pipelines.

Alaska Pipeline System. This Court should exercise its jurisdiction to review the decision below.

II. The Court Below Devised A New Test, Contrary To The Holdings Of This Court, For Determining When One Federal Statute Repeals Another By Implication.

The Court of Claims determined that the two statutes were "on their faces" "inconsistent" and that this was sufficient to meet the tests of *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974), and *Morton* v. *Mancari,* 417 U.S. 535 (1974), for implying a partial repeal of one federal statute by another. Appendix at 3a and 4a, 649 F.2d at 833.

As shown above, the two statutes are not inconsistent on their faces. Indeed, the court below recognized that the Pipeline Act and the FWPCA could be construed harmoniously when it stated, "the narrow purpose of the amendment [Section 204(b)] was to remove the $8 million limit upon the cleanup costs the United States could recover from a polluter under the Water Pollution Control Act. . . ." Appendix at 7a, 649 F.2d at 835. Nevertheless, the Court of Claims held that Section 311(i) did not apply to TAPS and that the phrase in the Pipeline Act, "polluted by activities conducted by or on behalf of the [right-of-way holders]," had no effect. The court determined the two statutes to be inconsistent on the erroneous belief that a later, special statute controls earlier general statutes in all circumstances, citing *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974), and *Morton* v. *Mancari,* 417 U.S. 535 (1974).

The correct test for statutory interpretation, which has been repeatedly enunciated by this Court, is that two statutes should be construed harmoniously if at all possi-

ble. Whenever a court of the United States applies one act of Congress to the exclusion of another act on the same subject, the will of Congress is at least partly frustrated. Thus, "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari,* 417 U.S. 535, 551 (1974).

This Court has directed that statutes should not be impliedly repealed unless there is a " 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled . . .", *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974), and unless the legislature has used language showing that it has made a considered determination to that end. *Id.; United States* v. *Welden,* 377 U.S. 95, 102, n.12 (1964). This Court has also directed that a statute can impliedly repeal an earlier statute only if the two acts are in "irreconcilable conflict" and even then the repeal may only be to the "minimum extent necessary." *Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148, 155 (1976).

Even if a facial "inconsistency" did exist between the Pipeline Act and the FWPCA, the use of such inconsistency as a basis for repeal of a federal statute is unprecedented. This Court, therefore, should approve or disapprove the imposition of this new "facial inconsistency" standard for the repeal of one federal statute by another.

III. The Decision Below Is In Conflict With Principles Established By The United States Courts Of Appeals And This Court Indicating That The Federal Water Pollution Control Act Was Intended By Congress To Be Both Uniform And Comprehensive.

Cases such as this, brought under section 311(i) of the FWPCA to recover oil spill cleanup costs, may only be brought in the Court of Claims. 33 U.S.C. §1321(i) (1). However, the FWPCA does give jurisdiction to United States District Courts and Courts of Appeals over suits brought by the United States to recover oil spill cleanup costs. In that context, the Fifth Circuit found that "[e]very court that has considered this issue has held that the FWPCA provides the government's exclusive remedy [, statutory or otherwise,] for recovering oil spill cleanup costs." *United States* v. *Dixie Carriers, Inc.*, 627 F.2d 736, 738 (5th Cir. 1980) (citations omitted). Such an approach is consistent with this Court's opinion in *Milwaukee* v. *Illinois*, 451 U.S. _____, 49 U.S.L.W. 4445 (1981), wherein the Court found that "Congress' intent in enacting the [FWPCA in 1972] was clearly to establish an all-encompassing program of water pollution regulation." 451 U.S. _____, 49 U.S.L.W. at 4449. In contrast, the Court of Claims has held that, rather than being the sole determinant of who pays for oil spill cleanup, the FWPCA is not even a factor to be considered in the case of the Trans-Alaska Pipeline System.

When Congress further amended the Federal Water Pollution Control Act by enacting the Clean Water Act of 1977, it certainly intended for the new act to be no less uniform or comprehensive than the 1972 amendments. *See generally*, S. Rep. No. 370, 95th Cong., 1st Sess. 1-2 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 4327-28. When the Senate Committee on Environment and Public Works reported the 1977 amend-

ments, it noted that the "implementation [of the 1972 Federal Water Pollution Control Act amendments] has been uneven, often contrary to congressional intent, and, frequently more the result of judicial order than administrative initiative."[4] S. Rep. No. 370, 95th Cong., 1st Sess. 1 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 4327.

The 1977 Clean Water Act amendments to section 311(g) of the FWPCA, 33 U.S.C. §1321(g), effectively require a facility owner or operator to clean up spills caused solely by a third party and to bring an action under Section 311(i) in the Court of Claims. With regard to this type of case, a direct conflict between the Courts of Appeals and the Court of Claims will never arise. In contrast to the decisions of the Courts of Appeals, the Court of Claims in the case below has not viewed the FWPCA as Congress' definitive statement on federal water pollution control policy. Consequently, this Court should determine whether Congress impliedly made an exception from a portion of its "all-encompassing" regulatory scheme in the FWPCA for the largest crude oil transportation facility in the country.

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[4] Section 311 of the FWPCA was amended by the Clean Water Act of 1977 to exclude specifically activities under the Deepwater Port Act of 1974. The court, in explaining why the Pipeline Act was not similarly excluded, conjectured that the omission was not inadvertent "because [Congress] believed that in Section 204(b) it had already provided that exception." Appendix at 9a, 649 F.2d at 836. The Court of Claims' conjecture as to why Congress did not further amend Section 311(i) does not alter what Congress actually did, and did not do, in 1977.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Claims.

Respectfully submitted,

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August 4, 1981

APPENDIX

In the United States Court of Claims

No. 446-79L

(Decided May 6, 1981)

ALYESKA PIPELINE SERVICE COMPANY, ET AL.
v. THE UNITED STATES

Ernest C. Baynard III, attorney of record, for plaintiff. *Connole and O'Connell* and *Alfred T. Smith*, of counsel.

Raymond W. Mushal, with whom was *Assistant Attorney General James W. Moorman*, for defendant. *Donald W. Stever, Jr.*, Department of Justice, and *James K. Augustine*, United States Coast Guard, of counsel.

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and KUNZIG, *Judge*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FRIEDMAN, *Chief Judge*, delivered the opinion of the court:

This is an action by the Alyeska Pipeline Service Company, which with its constituent companies owns and operates the Trans-Alaska Pipeline System, to recover from the United States the costs of cleaning up oil discharged from the pipeline into navigable waters. The suit is brought pursuant to section 311 of the Water Pollution Control Act, 33 U.S.C. §

1321, which provides that the owner or operator of the facilities that caused the pollution may recover its clean-up costs from the United States if the oil discharge was caused by a third party and did not involve any fault of the owner or operator. The question before us, raised by the defendant's motion for summary judgment dismissing the petition, is whether the subsequent Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93–153, title II, 87 Stat. 584, 43 U.S.C. § 1651 *et seq.* (Pipeline Act), bars the plaintiffs from recovering. We hold that it does, and therefore grant the defendant's motion for summary judgment and dismiss the petition.

I.

The plaintiffs' petition makes the following allegations, which the government accepts for purposes of its motion for summary judgment: In February 1978, an unknown saboteur detonated an explosive charge which breached the pipeline, causing the discharge of oil "in harmful quantities" into the navigable waters of the United States and onto adjoining shorelines in Alaska. In response, the plaintiffs repaired the pipeline to contain the leak, and removed the oil in accordance with applicable federal regulations, at a total cost of $1,169,035.51. According to the plaintiffs, under the Water Pollution Control Act the foregoing facts entitle them to recover their clean-up costs.

The United States apparently does not deny that these facts state a claim for relief under the Water Pollution Control Act. It contends, however, that the governing statute in this case is not that Act but the Pipeline Act, and that under the latter statute the plaintiffs cannot recover.

II.

A. The pertinent provisions of the two statutes are as follows. The Water Pollution Control Act directs the President to remove or arrange for the removal of oil discharged into navigable waters. Section 311(c), 33 U.S.C. § 1321(c). It makes the owners and operators of any onshore facility causing such pollution liable to the United States for the government's clean-up costs not exceeding $50 million, unless the spill was caused solely by an act of God, an act of war,

negligence by the government, an act or omission of a third party, or a combination of these causes. Section 311(f)(2), 33 U.S.C. § 1321(f)(2). If, however, the owner or operator itself cleans up an oil discharge, it may recover in a suit against the United States in this court the reasonable cost of that cleanup if it establishes that the discharge

> was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party, without regard to whether such act or omission was or was not negligent, or any combination of the foregoing causes.

Section 311(i)(1), 33 U.S.C. § 1321(i)(1).

In sharp contrast, section 204(b) of the Pipeline Act makes the owner or operator liable for the cost of removal of an oil discharge and does not permit it either to recover its removal costs or to avoid reimbursing the United States, if the latter makes the cleanup, on the ground that the discharge was caused solely by a third party. It states:

> If any area within or without the [pipeline] right-of-way or permit area granted under this chapter is polluted by any activities conducted by or on behalf of the holder to whom such right-of-way or permit was granted, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be at the expense of such holder . . . . Upon failure of such holder to adequately control and remove such pollutant, the Secretary, in cooperation with other Federal, State, or local agencies, or in cooperation with such holder, or both, shall have the right to accomplish the control and removal at the expense of such holder.

43 U.S.C. § 1653(b).

On their faces, these two provisions are inconsistent. Section 204(b) of the Pipeline Act provides that the "control and total removal of the pollutant shall be at the expense of" the pipeline owners and operators, without an exception for situations where the discharge was caused solely by a third person. Section 311(i)(1) of the Water Pollution Control Act, however, permits the owner or operator of the discharging facility to avoid liability to the government for clean-up costs if a third person caused the discharge, by doing the cleanup itself and recovering its costs from the United States.

Under normal principles of statutory interpretation, the later enacted Pipeline Act prevails over the earlier enacted Water Pollution Control Act. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974). This is particularly true where, as here, the later legislation is a special statute addressed to the specific case while the earlier one is a more general law. *Morton* v. *Mancari*, 417 U.S. 535, 550–51 (1974).

B. The plaintiffs contend, however, that section 204(b) does not apply in this case. They construe the section as incorporating a fault standard of liability and as intending only to abolish the limits on the amount of recovery under the Water Pollution Control Act.

1. The plaintiffs argue that the oil discharge did not result from "any activities conducted by or on behalf of" them, since it was caused by sabotage committed by a third person. The plaintiffs thus construe section 204(b) as making the pipeline liable for oil clean-up costs only if the pipeline or its agents caused the discharge, *i.e.*, only where they were at fault.

We do not read section 204(b) that narrowly. The pipeline area in this case was "polluted by" the "activities" of the plaintiffs in operating the pipeline. The pollution resulted from the breach of the pipeline through which oil was being transported. The cause of the breach is immaterial in determining whether the discharge was attributable to the plaintiffs' "activities."

Congress' use of the broad phrase "any activities conducted by or on behalf of" the pipeline was not inadvertent. These words are in sharp contrast to the language of the Water Pollution Control Act, in which the liability of the owner or operator to clean up an oil discharge depends upon who or what caused the discharge. As noted previously, under the Water Pollution Control Act, an owner or operator may recover from the United States its clean-up costs for an oil discharge that was caused solely by "an act or omission of a third party . . . ." 33 U.S.C. § 1321(i)(1). The liability for clean-up costs that section 204(b) creates, however, is based not upon an "act or omission" of the owners or operators of the pipeline, but upon pollution resulting from "any activities conducted by or on behalf of" them.

This broad standard, as the conference committee report on the Pipeline Act explained, imposes liability upon the pipeline owners and operators for removal of oil from "any area that

is polluted by *operations* of the [pipeline permit] holder." H.R. CONF. REP. NO. 93-624, 93d Cong., 1st Sess. 24 (1973), *reprinted in* [1973] U.S. CODE, CONG. & AD. NEWS 2523, 2526 (emphasis added). In section 204(b) Congress thus made the plaintiffs absolutely liable for any pollution resulting from the operation of the pipeline, without regard to whose fault caused the pollution.

Other provisions of the Pipeline Act that also use the word "activities" further support this conclusion. Section 204(a), which imposes liability on the pipeline owners for environmental damages, provides that they "shall be strictly liable to all damaged parties . . . without regard to fault" except

> when the holder of the pipeline right-of-way . . . can prove that damages in connection with or resulting from activities along or in the vicinity of the proposed . . . pipeline right-of-way were caused by an act of war or negligence of the United States, other government entity, or the damaged party . . . .

43 U.S.C. § 1653(a)(1). This provision distinguishes between environmental damage "resulting from activities" of the pipeline's operations and that "caused by an act" of an intervening party. *See also* the provision of title I of Pub. L. No. 93-153, 87 Stat. 576, enacted with the Pipeline Act, that permits the Secretary of the Interior to establish "a standard of strict liability to govern activities taking place on a right-of-way or permit area which the Secretary or agency head determines, in his discretion, to present a foreseeable hazard or risk of danger to the United States." 30 U.S.C. § 185(x)(2). The only exceptions to this strict liability standard occur when "damage or injury" results from "an act of war" or "negligence of the United States." 30 U.S.C. § 185(x)(3).

2. The plaintiffs argue that the legislative history of the Pipeline Act shows that section 204(b) was intended only to remove the limit the Water Pollution Control Act set upon the amount of clean-up costs the United States could recover from the owner or operator of a polluting facility. The legislative history does not justify this conclusion. Instead, it supports our conclusion that section 204(b) makes the plaintiffs absolutely liable for their costs of removing the oil discharged from their pipeline.

Section 204(b) originated as a floor amendment that Representative Dingell proposed to add to section 207 of the

bill. 119 CONG. REC. 27716–17 (1973). Section 207 then contained provisions similar to those now in sections 204(a) and (c), which respectively impose strict liability upon the pipeline owners and operators for damages to land or other resources and upon vessel owners for discharge of oil from vessels transporting it from the pipeline. The House Committee Report on the bill explained that section 207

> imposes strict liability, regardless of fault, on the holder of a trans-Alaskan right-of-way or permit for damages to the United States, the State of Alaska, or any other party caused by the holder's activities along the route of the pipeline. The only exceptions are damages caused by an act of war or by the negligence of the United States or any other government [entity]

and "imposes similar no-fault liability for damages resulting from discharges of oil" from vessels. H.R. REP. No. 93–414, 93d Cong., 1st Sess. 18–19 (1973).

In offering the amendment, which the House adopted after only brief debate, Mr. Dingell stated:

> The committee has sought to impose absolute liability for oil spills and environmental damage resulting from the pipeline. However, even though sections 207(a), (b), and (c) impose on the holder of the right-of-way this strict liability for damages resulting from the holder's activities at any point along the pipeline and from the discharge of oil from vessels carrying oil which had been transported through the pipeline, these sections do not fully cover the matter of reimbursing the United States for costs incurred by the United States in removing pollutants.
>
> Thus the Water Pollution Control Act, which never envisaged spills from the trans-Alaska pipeline but is nevertheless applicable to the matter of reimbursement for cleanup costs in removing oil spills in Alaska, imposes an $8 million limitation [now $50 million, 33 U.S.C. § 1321(f)(2) (Supp. II, 1978)] on the liability of an onshore oil facility for the cost of cleaning up its oil spill. This limit could be wholly inadequate to pay for the cost to the United States of removing oil spilled from the pipeline.
>
> The amendment I offer, therefore, would remove the dollar limitation for damages resulting from and for reimbursement of the cost of removal of any spill of oil transported through the trans-Alaska pipeline.
>
> • • •

> To recapitulate very briefly, the function is to see to it that we can assess the cost to the Federal Government of cleanup against the individual who has the permit.

119 CONG. REC. 27717 (1973).

In response to a statement by another member, Mr. Dingell "reiterate[d] that absent the language of this amendment the United States may not be fully compensated for the cost of cleanup." *Id.*

Although the narrow purpose of the amendment was to remove the $8 million limit upon the clean-up costs the United States could recover from a polluter under the Water Pollution Control Act, the language, intent, and effect of the provision were not so limited. To the contrary, Representative Dingell stated that the committee's objective of imposing absolute or strict liability for oil discharges "resulting from the pipeline" would be thwarted unless the United States could recover its total clean-up costs "against the individual who has the permit." The amendment did not eliminate the $8 million limitation by amending the Water Pollution Control Act. Instead, it added to the Pipeline Act a new provision making the pipeline owners and operators responsible for the total clean-up costs without regard to whether they or the United States did the work.

The basic objective of Mr. Dingell's amendment thus was to make the pipeline owners and operators absolutely liable for the total costs of cleaning up an oil discharge resulting from the operation of the pipeline. It would defeat that objective to permit the plaintiffs to recover from the United States under the Water Pollution Control Act their costs of cleaning up an oil discharge from their pipeline that was caused by the activity of a third person and not the fault of the plaintiffs.

For these reasons it is also immaterial that section 204(b), unlike other provisions of the Pipeline Act, does not contain words like "strictly liable" or "liable without fault" in defining the liability of those whose facilities cause pollution. As we have shown, the language and legislative history of section 204(b) demonstrate that Congress intended to make the pipeline owners and operators absolutely liable for the cost of cleaning up oil discharged from the pipeline. The absence of specific language in that section explicitly so stating does not negate that conclusion.

C. These reasons also refute the plaintiffs' further contention that the provision in section 204(b) that the cleanup of the oil discharge "shall be at the expense of" the pipeline owners and operators means only that they are to pay the initial cost of that work, but does not bar them from subsequently recovering that cost from the United States under the Water Pollution Control Act. There is nothing in either the language or the legislative history of section 204(b) indicating that Congress intended the words "at the expense of" to have that narrow or unusual meaning.

Indeed, the plaintiffs' argument is inconsistent with the last sentence of section 204(b), which provides that if the permit holder fails to clean up the discharge, the United States may do so "at the expense of" such holder. Since section 204(b) uses the same phrase to cover both situations, it would be anomalous to permit the United States to recover its clean-up costs from the pipeline owner and operator, yet to permit the latter, if it performed the cleanup, to recover its costs from the United States. When Congress said that the removal of the discharged oil was to be "at the expense of" the pipeline owner and operator, it meant precisely that; no matter who did the work, the cost ultimately was to be borne by the pipeline owner and operator.

D. The plaintiffs point out that the Water Pollution Control Act specifically makes the reimbursement provision inapplicable to situations where liability for clean-up costs is established pursuant to two specified statutes other than the Pipeline Act. That provision states:

> The provisions of [section 311(i), 33 U.S.C. § 1321(i)] shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act, or the Deepwater Ports Act of 1974.

Section 311(i)(2), 33 U.S.C. § 1321(i)(2).

The plaintiffs argue that if Congress had intended to make the Water Pollution Control Act reimbursement provisions inapplicable to liability imposed by the Pipeline Act, it would have so stated in section 311(i)(2). They note that the exception for the Deepwater Ports Act was added by the Clean Water Act of 1977, Pub. L. No. 95–217, § 58(m), 91 Stat. 1596, after enactment of the Pipeline Act. They conclude that if Congress had intended to make these provisions inapplica-

ble to clean-up costs imposed by the Pipeline Act, it would at that time also have added the latter Act to the excepted statutes.

The conclusion the plaintiffs draw from their premises does not necessarily follow. It is equally plausible that Congress did not add the Pipeline Act to the exceptions in section 311(i)(2) because it believed that in section 204(b) it had already provided that exception. The legislative history of the Clean Water Act of 1977 shows that Congress added the exception for the Deepwater Ports Act to section 311(i)(2) because of belief that the Ports Act had not altered or changed the Water Pollution Control Act. *See* S. REP. NO. 95–370, 95th Cong., 1st Sess. 64–65 (1977), *reprinted in* [1977] U.S. CODE, CONG. & AD. NEWS 4326, 4389–90; H.R. CONF. REP. NO. 95–830, 95th Cong., 1st Sess. 91 (1977), *reprinted in* [1977] U.S. CODE, CONG. & AD. NEWS 4424, 4466. In any event, whatever significance these arguments may have in interpreting these statutes, they are strongly outweighed by the considerations pointing to the contrary conclusion we have previously set forth.

E. At oral argument the plaintiffs contended that even if section 204(b) of the Pipeline Act governs this case, summary judgment for the defendant should not be granted because the defendant has not shown, as that section requires, that the discharge of oil "damage[d] or threaten[ed] to damage aquatic life, wildlife, or public or private property," and that a trial is necessary to determine that issue. In their petition, however, the plaintiffs stated that "oil in harmful quantities" was discharged into navigable waters and onto adjoining shorelines. In their briefs the plaintiffs stated that approximately 12,000 to 14,000 barrels of oil were discharged. The discharge of that large a quantity of oil into navigable waters necessarily at least "threaten[ed]" to, if it did not actually, damage aquatic life, wildlife, or public or private property.

CONCLUSION

The defendant's motion for summary judgment is granted, and the petition is dismissed.

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Opposition

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No. 81-231

In the Supreme Court of the United States

OCTOBER TERM, 1980

ALYESKA PIPELINE SERVICE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 204(b) of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1653(b), precludes recovery under Section 311(i) of the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. III) 1321(i), of money expended upon the cleanup of oil spilled from the Trans-Alaska pipeline.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-9a) is reported at 649 F. 2d 831.

JURISDICTION

The judgment of the Court of Claims was entered on May 6, 1981. The petition for a writ of certiorari was filed on August 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 311(i) of the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. III) 1321(i), and Section 204(b) of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1653(b), are reproduced at pages 3-4 of the petition.

STATEMENT

For purposes of the summary judgment motion that was before the Court of Claims and the petition for a writ of

certiorari, the United States accepts as true the following representations made by petitioners (Pet. 6). On February 15, 1978, an unknown saboteur blew a hole in the Trans-Alaska Pipeline System, from which approximately 14,000 barrels of oil were discharged into Steele Creek and onto adjacent land. Petitioner Alyeska Pipeline Service Company, the operator of the pipeline system, spent $1,169,035.51 cleaning up the spill.

Petitioners filed this action to recover from the United States the cleanup costs, pursuant to Section 311(i) of the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. III) 1321(i). The Court of Claims granted the government's motion for summary judgment on the ground that Section 204(b) of the subsequently enacted Trans-Alaska Pipeline Authorization Act (TAPA), 43 U.S.C. 1653(b), bars petitioners' recovery.

ARGUMENT

The Court of Claims properly concluded that Section 204(b) of TAPA, 43 U.S.C. 1653(b), precludes cleanup cost reimbursement otherwise available under Section 311(i) of the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. III) 1321(i), for oil spills originating from the Trans-Alaska Pipeline System. Accordingly, there is no need for further review by this Court.

1. As the Court of Claims held (Pet. App. 3a), 33 U.S.C. (& Supp. III) 1321(i) and 43 U.S.C. 1653(b) are facially inconsistent. On the one hand, the Federal Water Pollution Control Act provision permits a facility owner or operator to sue the United States in the Court of Claims for oil spill cleanup costs and to recover those costs if it can show that the spill was caused solely by "an act or omission of a third party * * *." See *City of Pawtucket* v. *United States*, 211 Ct. Cl. 324 (1976). The TAPA provision, on the other hand, provides that if any area "is polluted by any activities conducted by or on behalf of the [permit] holder * * * the

control and total removal of the pollutant shall be at the expense of such [permit] holder," without any exception for situations where the discharge was caused solely by a third person.

Petitioners' attempt to reconcile the two provisions by construing TAPA as including a fault standard of liability is without support in either the language of TAPA or its legislative history. As the Court of Claims explained (Pet. App. 4a):

> The pipeline area in this case was "polluted by" the "activities" of the [petitioners] in operating the pipeline. The pollution resulted from the breach of the pipeline through which oil was being transported. The cause of the breach is immaterial in determining whether the discharge was attributable to the [petitioners'] "activities".

Other provisions of TAPA that also use the word "activities" provide further support for this conclusion. Section 204(a), 43 U.S.C. 1653(a), which imposes liability on pipeline owners and operators for damage to land and other resources, provides that such operators and owners "shall be strictly liable to all damaged parties * * * without regard to fault" except only "when the holder of the pipeline right-of-way * * * can prove that damages in connection with or resulting from activities along or in the vicinity of the proposed Trans-Alaskan pipeline right-of-way were caused by an act of war or negligence of the United States, other government entity, or the damaged party * * *." This provision confirms the distinction between damage "resulting from activities" of the pipeline's operations and that "caused by an act" of an intervening party. Similarly, Section 204(c), 43 U.S.C. 1653(c), imposes strict liability on vessel owners for damages resulting from the discharge of oil from vessels transporting it from the pipeline except where "the owner or operator of the vessel * * * can prove that the damages were caused by an act or [*sic*] war[,] by the

negligence of the United States or other governmental agency * * * [or] by the negligence of [the allegedly damaged] party." See also Section 28(x)(2) of the Mineral Leasing Act of 1920, 30 U.S.C. 185(x)(2), an amendment that originated in conjunction wtih TAPA, which permits the Secretary of the Interior to impose strict liability standards (subject only to exceptions for acts of war and negligence of the United States; 30 U.S.C. 185(x)(3)) on other pipelines traversing federal lands.[1] Acceptance of petitioners' arguments thus would mean that strict liability principles could be applied to all pipelines other than "the largest crude oil transportation system in the United States" (Pet. 7).

Moreover, although the phrase "strict liability" does not appear as such in 43 U.S.C. 1653(b), the legislative history of TAPA makes clear that the Congress that enacted the legislation intended, in that section and others, to impose strict liability on the pipeline companies. Section 204(b) of TAPA, 43 U.S.C. 1653(b), originated as a floor amendment to Section 207 of the bill, which then contained provisions similar to those now included in Sections 204(a) and (c), 43 U.S.C. 1653(a) and (c), described above. Representative Dingell, sponsor of the amendment, explained its purpose as follows (119 Cong. Rec. 27717 (1973)):

> [T]he function of this amendment is very simple. The committee has sought to impose absolute liability for oil spills and environmental damage resulting from the pipeline. However, even though [present Sections 204(a) and (c)] impose on the holder of the right-of-way this strict liability for damages resulting from the holder's activities at any point along the pipeline and from the discharge of oil from vessels carrying oil

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[1]The amendment to the Mineral Leasing Act of 1920 and TAPA were enacted as Titles I and II, respectively, of Pub. L. No. 93-153, 87 Stat. 576.

which had been transported through the pipeline, these sections do not fully cover the matter of reimbursing the United States for costs incurred by the United States in removing pollutants.

Thus the Water Pollution Control Act, which never envisaged spills from the trans-Alaska pipeline but is nevertheless applicable to the matter of reimbursement for cleanup costs in removing oil spills in Alaska, imposes an $8 million limitation on the liability of an onshore oil facility for the cost of cleaning up its oil spill. This limit could be wholly inadequate to pay for the cost to the United States of removing oil spilled from the pipeline.

The amendment I offer, therefore, would remove the dollar limitation for damages resulting from and for reimbursement of the cost of removal of any spill of oil transported through the trans-Alaska pipeline.

* * * * *

To recapitulate very briefly, the function is to see to it that we can assess the cost to the Federal Government of cleanup against the individual who has the permit.

In sum, Congress recognized the extraordinary environmental risks associated with the Trans-Alaska Pipeline System venture and concluded that those who undertook that venture in search of profit, not the taxpayers, should also bear the burden of those risks. See also 119 Cong. Rec. 36606 (1973) (remarks of Rep. Udall).[2]

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[2]Although the narrowest purpose of the amendment may have been the removal of the then $8 (now $50) million limit on the cleanup costs recoverable by the United States from a polluter, its broader purpose was to effectuate the imposition of strict liability "for oil spills and environmental damage resulting from the pipeline" (119 Cong. Rec.

2. In view of the conflict between 33 U.S.C. (& Supp. III) 1321(i) and 43 U.S.C. 1653(b), the Court of Claims correctly construed 43 U.S.C. 1653(b), the later-enacted statute, in which Congress directed its attention to the cleanup of pollution from one specific source—the Trans-Alaska Pipeline—as a qualification to the broad terms of Section 311(i), the earlier statute, which addressed the issue of the cleanup of oil spills in general. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). The result is a construction that leaves Section 311(i), 33 U.S.C. 1321(i), intact except for a qualification that properly reflects Congress' apparent intent.

3. This Court's recent decision in *City of Milwaukee* v. *Illinois*, No. 79-408 (Apr. 28, 1981), is of no avail to petitioners. *City of Milwaukee* stands only for the proposition that the Federal Water Pollution Control Act's general regulatory scheme precludes the existence of a separate common law of nuisance that was recognized, prior to the Act, in *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 107 (1972). In particular, the Court held (*City of Milwaukee* v. *Illinois, supra*, slip op. 13-16), there is no room for a federal common law of nuisance concerning ongoing pollutant discharges covered by the National Pollution Discharge Elimination System of federal and state discharge permits. The Court's reference to the comprehensive nature of the Act (*id.* at 10-12), however, cannot be construed to mean that the statute contains all of the federal law pertinent to the subject of water pollution, since such an interpretation would ignore the effects of other water pollution control

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27717 (1973) (remarks of Rep. Dingell). Representative Dingell thus explained (*ibid.*) that the congressional objective of imposing strict liability for oil discharges "resulting from the pipeline" would be thwarted unless the United States could recover its total cleanup costs "against the individual who has the permit."

statutes, including, *inter alia*, the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. (& Supp. III) 401 *et seq.*; the Ocean Dumping Act, 33 U.S.C. (& Supp. III) 1401 *et seq.*; the Deepwater Ports Act of 1974, 33 U.S.C. (& Supp. III) 1501 *et seq.*; the National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. III) 4321 *et seq.*; insofar as it applies to federal activities affecting water pollution; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. III) 6901 *et seq.*, insofar as it affects unpermitted hazardous waste disposals into the water; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767; and the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. III) 1331 *et seq.* Plainly, those statutes continue to co-exist with the Federal Water Pollution Control Act, as does Section 204(b) of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1653(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

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Petitioner's Reply Brief

No. 81-231

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ARCO PIPE LINE COMPANY,
BP PIPELINES INC.,
EXXON PIPELINE COMPANY,
MOBIL ALASKA PIPELINE COMPANY,
PHILLIPS ALASKA PIPELINE CORPORATION,
SOHIO PIPE LINE COMPANY AND
UNION ALASKA PIPELINE COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Claims

PETITIONERS' REPLY MEMORANDUM

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IN THE

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OCTOBER TERM, 1981

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THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Claims

PETITIONERS' REPLY MEMORANDUM

Respondent, in its Brief in Opposition, raises an issue not addressed in Petitioners' Petition For A Writ Of Certiorari. Petitioners, therefore, respectfully submit this Reply Memorandum.

Respondent argues that section 204(b) of the Trans-Alaska Pipeline Authorization Act ("Pipeline Act") establishes liability without fault for the cleanup of pollution in or near the pipeline and that the cause of the discharge is irrelevant. Respondent then characterizes Petitioners' argument as

"attempt[ing] to reconcile the [Federal Water Pollution Control Act and the Pipeline Act] by construing TAPA as including a fault standard of liability . . . ." Brief in Opp. at 3. This characterization is inaccurate. Petitioners, in fact, maintain that Section 204(b) applies only when a discharge is caused by the activities of the pipeline owners or their agents. Thus, even if Section 204(b) were held to impose liability without fault, as Respondent argues, the issue would remain whether the activities of Petitioners were the cause of a discharge.

The court below, like Respondent in its Brief, confused the issues of fault and causation. For example, the Court of Claims asserted that Petitioners' interpretation of Section 204(b) would make "the pipeline liable for oil clean-up costs only if the pipeline or its agents caused the discharge, *i.e.*, only where they were at fault." Pet. App. at 4a. Federal courts have consistently held that causation is a separate, necessary element for liability under statutes imposing strict liability. *E.g., United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974).

Respondent has raised the issue of whether causation is a consideration in determining liability under section 204(b) of the Pipeline Act. Respondent's interpretation of this section, *i.e.*, that causation is irrelevant, is in direct conflict with the plain language of the statute. Resolution of the conflict in

interpreting this important federal statute is all the more reason for this Court to grant Petitioners' Petition For A Writ Of Certiorari.

Respectfully submitted,

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